Supreme Court, U. S.
FILED
JAN 4 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-851

SAMUEL G. ALBERT, M.D., and
FRED G. ALBERT, D.P.M.,
Petitioners,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

RESPONDENT'S BRIEF IN OPPOSITION

STEPHEN F. ADAMINI
Attorney for Respondent

KENDRICKS, BORDEAU, CASSELMAN AND ADAMINI, P.C.

128 West Spring Street
Marquette, Michigan 49855
(906) 226-2543

AMERICAN BRIEF AND RECORD COMPANY, 125 WEALTHY STREET, S.E., GRAND RAPIDS, MICHIGAN 49503 — PHONE GL 8-5326

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statement	2
Argument	2
Conclusion	5
Appendix A — Michigan General Court Rules of 1963, 116.1 & .2	6
Appendix B — Circuit Court Answer of Petitioners	7
Appendix C — Opinion of Gogebic County Circuit Court, pages 1-4	11
Appendix D — Pre-Trial Summary of Gogebic County Circuit Court Case Containing Stipulation of Counsel as to Probate Court Testimony	14

CASE CITATIONS

	Page
Black vs. Cutter Laboratories, 351 US 292, 100 L ed. 1188, 76 S Ct. 824, reh. den. 352 US 859, 1 L ed. 2d 69, 77 S Ct. 21	4
Henry vs. State of Mississippi, 379 US 443, 448; 85 S Ct. 564, 567 (1965)	5

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. --------

SAMUEL G. ALBERT, M.D., and
FRED G. ALBERT, D.P.M.,

Petitioners,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Michigan

---

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Michigan (Petitioners' Appendix A) is reported at 66 Mich App 252. The Supreme Court of the State of Michigan denied leave to appeal without opinion (Petitioners' Appendix A).

JURISDICTION

The jurisdictional requisites are not adequately set forth in that the petition does not contain the statement of grounds on which the jurisdiction of this Court is invoked as required by Rule 23, Rules of Supreme Court.

STATEMENT

The facts of the case are stated fully in the Decision of the Court of Appeals of the State of Michigan (Petitioners' Appendix A).

ARGUMENT

Respondent opposes the Petition for Writ of Certiorari for the reason that this controversy does not involve any issue arising under the Federal Constitution or statutes of the United States. The state court decisions rested solely on independent and adequate state grounds, and federal questions were neither raised nor decided.

A. Inasmuch as no substantial federal question is involved in this case, it seems almost unnecessary to point out that the question of jurisdiction of the Circuit Court (Pet., pp. 19-22) was never properly presented below. Under Michigan law, objection to jurisdiction is waived unless made in the responsive pleading on motion first filed. GCR 1963, 116. (Respondent's Appendix A). At no time did Petitioners file a motion for accelerated judgment in Circuit Court under GCR 1963, 116 or allege lack of jurisdiction in their Answer to the Circuit Court Complaint (Respondent's Appendix B). Further, it is submitted that complaints alleging conversion of estate assets or breach of fiduciary relationship are properly brought in the Circuit Court for the county in which the estate is being probated (Respondent's Appendix C, Opinion of Gogebic County Circuit Court, pp. 1-4).

Petitioners argue further that the Circuit Court lacked jurisdiction because Respondent did not have an order of the Probate Court authorizing it to institute the Circuit Court action (Pet., pp. 23-41). However, in its attempt to elevate this argument to a federal question, Petitioners cite no authority which would require such an order. Again, it should be noted that Petitioners failed to raise this alleged defect in their Circuit Court Answer. In addition, it is submitted that it is not necessary for Respondent to obtain an order authorizing the filing to suit. Respondent did seek instruction from the Probate Court, and the Court did concur with Respondent that it would be appropriate to bring an action in Circuit Court. It is submitted that the fiduciary has a duty to marshall the assets and, if necessary, file suit in Circuit Court to recover assets. In this case, it was incumbent upon the executor to recover securities which had been substituted by an unsecured promissory note at zero per cent interest per annum payable in ten years.

B. Petitioners claim that they did not obtain a fair and unbiased tribunal consistent with procedural and substantive due process (Pet., pp. 42-55). They claim that the probate judge was biased and prejudiced and, therefore, Petitioners did not obtain a fair hearing. It should be noted, however, that the probate judge did not hear the conversion case in Circuit Court. Although the testimony taken at the hearing on claims in Probate Court was admitted in the Circuit Court conversion case, it was admitted by stipulation of both attorneys of record (Respondent's Appendix D).

The claim that the circuit judge was biased and unfair is based upon an objection to the Court's ruling on Motion for New Trial. Respondent submits that the Circuit Court was correct in denying the Motion for New Trial. In addition, it should be noted that neither claim of bias was raised on appeal to the Michigan Court of Appeals, but was raised for the first time in Petitioners' Application for Leave to Appeal to the Supreme Court of Michigan.

Thus, this claim was never properly preserved for appeal.

C. Petitioners' claim that all of the proper parties in interest were not before the Circuit Court involves solely a question of state law as Petitioners point out in their brief (Pet., p. 57) and, accordingly, should not be reviewed by this Court. Furthermore, it was not until the completion of the Circuit Court action, and after the judgment was entered, that Petitioners, on Motion for New Trial, raised the question of proper parties. Petitioners also failed to raise this issue in the appeal to the Michigan Court of Appeals. Therefore, the question was never properly preserved below.

D. Petitioners' claim that no conversion took place (Pet., pp. 57-61) involves no federal question. Rather, it is one of fact and state law upon which the Circuit Court and Michigan Court of Appeals Decisions (Petitioners' Appendix A) were based. Furthermore, Petitioners cite no authority upon which this Court might base a decision to review the state court decisions. Petitioners argue simply that the lower courts were wrong in finding that conversion of funds took place. Again, no reason is apparent for review by this Court of the decisions below.

E. Petitioners claim further that, although they raised the federal question of due process in the state courts, those courts failed to consider this issue (Pet., pp. 62-64). It is submitted that the very fact that the state courts did not pass on a federal question would preclude review by this Court. See *Black vs. Cutter Laboratories*, 351 US 292, 100 L ed. 1188, 76 S Ct. 824, reh. den. 352 US 859, 1 L ed. 2d 69, 77 S Ct. 21.

Furthermore, Respondent submits that the state grounds were sufficient to support the state court judgments and that a decision on the federal question of due process was unnecessary to the courts' determination of the cause. This Court has often held that it will decline to review state court judgments which rest on independent and adequate state grounds, even where these judgments also decide federal questions. This principle has been applied not only to cases involving state substantive grounds, but

also in cases involving state procedural grounds. *Henry vs. State of Mississippi*, 379 US 443, 448; 85 S Ct. 564, 567 (1965).

Finally, it should be noted that the issue of due process was not raised on appeal to the Michigan Court of Appeals and, therefore, was not properly preserved for appeal (Pet., p. 62).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN F. ADAMINI
Attorney for Respondent

KENDRICKS, BORDEAU, CASSELMAN
AND ADAMINI, P.C.
128 West Spring Street
Marquette, Michigan 49855
(906) 226-2543

APPENDIX A — Michigan General Court Rules of 1963, 116.1 & .2

Rule 116 Accelerated Judgment.

.1 Grounds. In a party's first responsive pleading, or by motion filed not later than his first responsive pleading, a party may demand that service of process be quashed or that judgment be entered dismissing 1 or more claims asserted against him upon any of the following grounds:

(1) the court lacks jurisdiction of the person or property,

(2) the court lacks jurisdiction of the subject matter,

(3) the party asserting the claim lacks legal capacity to sue,

(4) another action is pending between the same parties involving the same claim,

(5) the claim is barred because of release, payment, prior judgment, statute of limitations, statute of frauds, infancy, or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action.

.2 Consolidation. The defense of lack of jurisdiction over the person or property is waived unless made in the responsive pleading or motion first filed. A party may combine in a single motion as many defenses or objections as he has based upon any of the grounds enumerated in sub-rule 116.1, and no more than 1 motion shall be permitted each party. No defense or objection is waived by being joined with one or more other defenses or objections, and whenever a motion to dismiss or a demand to quash service of process is denied, the action shall proceed without prejudice to the defendant's right to assign error as to such denial.

APPENDIX B — Circuit Court Answer of Petitioners

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

First National Bank and Trust Company of Marquette, Michigan, Executor of the Estate of George Albert, Deceased,
Plaintiff,

vs. File No. .....

Samuel G. Albert, M.D., and Fred G. Albert, D.P.M.,
Defendants.

ANSWER

NOW COMES the Defendants, Samuel G. Albert, M.D. and Fred G. Albert, D.P.M. by Bridges and Collins their attorneys and answer Plaintiff's Complaint as follows:

1. Defendants admit the allegations contained in paragraph 1.
2. Defendants admit the allegations contained in paragraph 2.
3. In answer to paragraph 3 of the Complaint the Defendants admit that George Albert died on the 24th of November 1970 and further admit that he had been ill for a considerable length of time; and in further answering said paragraph Defendants deny any inferences that may be raised in said paragraph.
4. Defendants admit the allegations contained in paragraph 4.
5. Defendants admit the allegations contained in paragraph 5.
6. Defendants admit the allegations contained in paragraph 6.

7. In answer to paragraph 7 the Defendants admit that on November 24, 1970 the Defendant, Fred G. Albert executed a check payable to Samuel G. Albert in the amount of $35,000.00 and admit further that at the time of executing said check the Defendant, Fred G. Albert knew there were insufficient funds in the account to cover the check and in further answering said paragraph the Defendants aver that said check was executed and mailed by the Defendant, Fred G. Albert on the morning of November 24, 1970 and that the deceased George Albert died in the afternoon of November 24, 1970.

8. In answer to paragraph 8 the Defendants admit the ordering of the sale of stock but deny that any order was placed on the 24th of November and allege that the order was placed with the broker early in the morning of November 23. In further answering said paragraph Defendants have no personal knowledge of the exact time that the sales were consummated by Piper Jaffray and therefore leave the Plaintiff to his proofs.

9. In answer to paragraph 9 the Defendants deny delivery of the certificates to Piper Jaffray on November 25 and allege the same to have been mailed prior to November 25. The date of mailing constituting the proper date of delivery rather than the date they were received by Piper Jaffray.

10. In answer to paragraph 10 the Defendants deny that the securities were owned as alleged by George Albert and purchased by him with his funds but allege the truth in fact to be that they were jointly owned some with John Albert and some with Lamice Albert. In further answering said paragraph the Defendants have no knowledge whose funds were invested in the purchase of said stocks and therefore leave the Plaintiff to his proofs thereon.

11. In answer to paragraph 11 the Defendants admit that Fred G. Albert made a deposit but deny having received any check from Piper, Jaffray & Hopwood in the amount of $35,000.00 but allege that the $34,137.39 which was deposited in said account was composed of three checks, one from Piper, Jaffray & Hopwood in the amount of $15,854.95 and one from Piper, Jaffray & Hopwood in the amount of $16,682.44 making a total of $32,537.39. The

third check was from the Defendant, Dr. Fred G. Albert, in the amount of $1600.00 making a total deposit of $34,-137.39. In further answering said paragraph the Defendants admit the check was deposited in the Northwestern State Bank of Austin, Minnesota.

12. In answer to paragraph 12 the Defendants deny the allegations therein contained.

COUNT I

MENTAL INCOMPETENCE

13. Defendants deny the allegations contained in paragraph 13.

COUNT II

UNDUE INFLUENCE AND DURESS

14. Defendants deny the allegations contained in paragraph 14.

COUNT III

ATTORNEY IN FACT ACTED BEYOND THE SCOPE OF POWER OF ATTORNEY

15. In answer to Paragraph 15 the Defendants deny that Dr. Fred G. Albert at any time exceeded any actual or extensible authority given by the deceased, George Albert, and in further answering the paragraph deny that Fred G. Albert made any loan to Samuel Albert and allege the truth in fact to be that the loan was in fact made by the deceased, George Albert, during his lifetime and that any actions by Dr. Fred G. Albert were at the direction of the deceased, George Albert.

COUNT IV

BREACH OF FIDUCIARY RELATIONSHIP

16. In answer to paragraph 16 the Defendants deny each and every allegation therein contained.

COUNT V

CONVERSION

17. In answer to paragraph 17 Defendants deny any allegations as to wrongful conduct or actions on the part of either of the Defendants.

COUNT VI

INTENTIONAL AND FRAUDULENT MISCONDUCT

18. In answer to paragraph 18 the Defendants deny the allegations therein contained.

WHEREFORE, Defendants demand that this action be dismissed and that any relief prayed for by Plaintiff be denied.

BRIDGES AND COLLINS
Attorneys for Defendants
By: (s) James M. Collins

Dated: Sept. 13, 1972

APPENDIX C — Opinion of Gogebic County Circuit Court, pages 1-4

(1)

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

First National Bank and Trust
Company of Marquette, Michigan,
Executor of the Estate of
George Albert, Deceased,
Plaintiff,

vs. File No. 72-38 NZ

Samuel G. Albert, M.D., and
Fred G. Albert, D.P.M.,
Defendants.

NON-JURY TRIAL

Proceedings had before the HONORABLE WILLIAM F. HOOD, Judge by appointment to the Thirty-Second Judicial Circuit of Michigan, at Bessemer, Michigan, in the Courthouse on March 4, 1974, at 1:00 p.m.

APPEARANCES:

MR. ROBERT BORDEAU
Kendricks & Bordeau, P.C.
Marquette, Michigan
On behalf of the Plaintiff

MR. OSWALD G. CASANOVA
Casanova & Ryan
Crystal Falls, Michigan
On behalf of the Defendants

James A. Joplin — Official Court Reporter

(2)

Bessemer, Michigan
March 4, 1974 — 1:00 P.M.

PROCEEDINGS

THE COURT: This is the case of the First National Bank and Trust Company of Marquette, Executor of the Estate of George Albert, Deceased, versus Samuel G. Albert, M.D. and Fred G. Albert, D.P.M., File No. 72-38, which is before the Court at this time for trial. There were three motions filed in this case and the Court has indicated by letter to counsel that all such motions would be denied and the letter stated that counsel would be informed of the reasons for such denial at the opening of the trial here today, the reasons to be stated on the record.

The first motion was Plaintiff's Motion for a Summary Judgment which was filed on December 21st, 1973, and as to this motion, which is based upon the claim that there are no material issues of fact, there is no material dispute on the issues of fact necessary to a decision in this case. The Court feels that this is a situation where the facts are complicated, such things as motives and intentions and matters of this kind are involved in the issues here, and that different inferences may be drawn from undisputed facts. The inferences to be drawn are nevertheless still questions of fact, and the Court felt that this case should not be decided upon the basis of a summary judgment, but that all (3) of the facts and reasons and motives behind certain of the acts, opportunity should be given to present testimony, and that as stated it should not be decided on the basis of a summary judgment. Even the matter of relief to be granted might depend upon such things as motives. For this reason Plaintiff's Motion for Summary Judgment is denied.

Now, the Defendant, Samuel Albert, in pro per, filed a Motion for Summary Judgment on January 2nd, 1974. The substance of that motion is that the Complaint does not state a claim upon which relief can be granted, it being the claim that the claims are mere conclusions and not a statement of complaint, not a factual statement of the

claim. This motion is denied simply on the grounds that it is not correct. The allegations are factual in nature and the Complaint, in view of the form being the defendants in the cause, they are required to defend and that motion is therefore denied.

The second motion on the part of the Defendants was a motion by Samuel Albert, again acting in pro per, for accelerated judgment. This was also filed on January 2, 1974. The claim in this Motion for Accelerated Judgment was exclusive jurisdiction for this controversy is in Probate Court and it was further claimed that the Probate Judge did not sign an order authorizing a substitution of this action, and the Plaintiff is bringing this action as agent for some of the heirs and has no capacity to sue the Defendants as heirs. (4) This motion is denied because it is not correct that the Probate Court has exclusive jurisdiction in claims brought by an executor to establish liability in seeking to recover a debt or an asset due to the estate. The Probate Judge did, according to the record that has been stipulated into evidence here, stated on the record in the Probate proceedings that this action was authorized and if authorization is required, this was snfficient and the signing of an order to that effect would be purely an administerial act. On the claim of the Defendant that the Plaintiff is acting as agent for some of the heirs and that he has no capacity to sue the Defendants as heirs, this is something that is not correct. The Plaintiff is not suing the Defendants as heirs, but on the claim that they are indebted to or have property that belongs to the estate. It is the fiduciary's duty to collect and preserve the assets of the estate and this is true whether the obligation is sought against a person who happens to be an heir or against some totally different person. These are the reasons why the motions that have been filed are denied.

The Court was handed just before the session was to convene this afternoon a form of substitution of attorneys in which the firm of Casanova and Ryan is substituted as counsel for the Defendants in place of Wilfred Dupuis. Mr. Casanova and Mr. Ryan are present representing the Defendants, and Mr. Bordeau is present representing the Plaintiff. • • •

APPENDIX D — Pre-Trial Summary of Gogebic County Circuit Court Case Containing Stipulation of Counsel as to Probate Court Testimony

STATE OF MICHIGAN

CIRCUIT COURT FOR THE COUNTY OF GOGEBIC

FIRST NATIONAL BANK AND TRUST COMPANY OF MARQUETTE, MICHIGAN, EXECUTOR OF THE ESTATE OF GEORGE ALBERT, DECEASED,
Plaintiff,

vs. File No. 72-38

SAMUEL G. ALBERT, M.D., and FRED G. ALBERT, D.P.M.,
Defendants.

PRE-TRIAL SUMMARY

At a session of said Court held in the Courthouse in the City of Bessemer, Michigan, on the 26th day of November, 1973.

PRESENT: HONORABLE WILLIAM F. HOOD, CIRCUIT JUDGE ON ASSIGNMENT

A Pre-Trial Conference was held in the above entitled matter. Plaintiffs were represented by Robert Bordeau of the law firm of Kendricks & Bordeau, Marquette, Michigan. Defendants were represented by Wilfred A. DuPuis of East Lansing, Michigan.

A Pre-Trial Conference was previously held before Honorable Donald L. Munro on the 30th of November, 1972 in which many items were covered and do not need to be restated here.

PLEADINGS

The Defendant, Fred G. Albert, desires to file a Counterclaim and will be given a period of fifteen days from this date in which to do so, and the Plaintiff will respond to the Counterclaim by filing an Answer or other appropriate response within ten days after receiving the Counterclaim. Other than this no further pleadings or amendments of pleadings are contemplated except that the parties intend to file the following motions.

Defendants desire to file a Motion for Accelarated Judgment or Summary Judgment on the ground that the Court lacks jurisdiction of the parties and subject matter and certain other grounds. The Defendants' motion and brief in support thereof are to be filed within thirty days of this date. Plaintiff's counsel will have twenty days in which to file an Answer to the motion and an answering brief. If the Defendants desire to file a reply brief, they will have an additional ten days in which to do so. The Plaintiff also desires to file a Motion for Summary Judgment or Accelerated Judgment. Such motion and a brief in support thereof will be filed within thirty days of this date, the Defendants having twenty days in which to file an Answer and brief, and the Plaintiff to have an additional ten days in the event a reply brief is desired. All of these motions will be regarded as submitted on briefs without oral argument.

WITNESSES AND EXHIBITS

The parties agree to exchange the names of witnesses and to exchange a list of proposed exhibits. It is very possible that counsel will stipulate to the admission of exhibits. If an exhibit is objected to by opposing counsel, counsel and the Court will be notified of the objection substantially in advance of trial. The exchange of witnesses and exhibits is to take place at least thirty days in advance of the trial. Both parties stipulate that the testimony of the Probate proceedings taken on February 16, 17 and 18, 1972, before Judge DeFant be evidence in this case. It is also agreed that the deposition of Dr. James

R. Acocks taken February 11, 1972 in the Probate Court proceedings be deemed evidence in this case.

TRIAL DATE

This matter is set for trial on Monday, March 4, 1974, beginning at 1:30 p.m. The entire week will be held available for the trial of this case and counsel should narrow the issues so that the trial can be expedited.

Dated at Manistique, Michigan, this the 26th day of November, 1973.

(s) William F. Hood
Circuit Judge by Assignment